

Editor's note: Appealed -- remanded for evidentiary hearing, Civ.No. A76-115 (D.Alaska July 2, 1980); See U.S. v. Evelyn M. Bunch (On Judicial Remand), 64 IBLA 318; appealed - aff'd, Civ.No. A76-115 (D.Alaska Jan. 14, 1983).

EVELYN M. BUNCH

IBLA 76-251

Decided May 13, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting application to purchase trade and manufacturing site AA-146.

Affirmed.

1. Alaska: Trade and Manufacturing Sites--Rules of Practice: Appeals: Hearings

One who appeals from the rejection of a trade and manufacturing site purchase application and disputes the factual findings and conclusions in the field examiner's report, is not entitled to an opportunity for a hearing on the disputed issues of fact when appellant's assertions of use and improvement, taken as true, do not show use of the land that qualifies her for the right of purchase.

2. Alaska: Trade and Manufacturing Sites--Grazing and Grazing Lands

Improvement of land by fencing, and use as horse pasture, constitutes agricultural use which does not qualify as "trade, manufacture, or other productive industry" within the meaning of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970), regardless of the type of business in connection with which the pasturage is desired.

3. Alaska: Trade and Manufacturing Sites--Rights-of-Way: Generally

Improvement of land by a road, and use of the land for access to a private inholding do not by themselves qualify the locator to purchase the land as a trade and manufacturing site.

APPEARANCES: Evelyn M. Bunch, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Evelyn Marie Bunch has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated August 22, 1975, rejecting her purchase application for a trade and manufacturing site located under the provisions of section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a et seq. (1970).

Appellant's notice of location, filed August 3, 1966, asserted settlement from July 22, and a gravel road and culverts as improvements on the claim. Appellant claimed the site for use in a "roadside business * * * catering to campers." Appellant's purchase application, filed July 28, 1971, showed use and improvement of the tract in connection with the hunting and guiding business appellant and her husband conduct from nearby private land. She asserted that the land was improved with three gravel roads, a clearing for a horse pasture and horse loading area, three highway advertising signs, and a log-jack and barbwire fence enclosing 40 to 60 acres. The purchase application was accompanied by copies of business licenses, brochures, and magazine advertisements placed by the Bunches for their hunting and guiding business.

The State Office field examiner reported that a cleared 5-acre portion of pasture had been seeded with brome grass. Based on the field examination, the State Office, in its August 22, 1975, decision, found that appellant's signs were within the 150-foot easement for the Glenn Highway established by Public Land Order (P.L.O.) No. 1613, 23 F.R. 2376 (1958), and that the land "has been used principally for agricultural purposes." Based on this latter finding, the State Office rejected the purchase application and canceled the claim, citing Omar Stratman, 16 IBLA 222 (1974).

In her notice of appeal, appellant argues, "We have in no way used my T & M Site AA-146 for agricultural purposes." In support of this she reiterates that the horses are not used for agricultural purposes, but rather "to pack hunting gear and

transport our hunters who pay for this service." In her supplemental statement of reasons appellant asserts, "We have not cultivated any portion of the land," and, "We do not raise or produce agricultural products. * * * The horses were fed commercial horse feed." In addition, appellant challenges the finding that the signs are within the Glenn Highway easement; she asserts that they are "well off" the right-of-way.

[1] The Board has held that a locator who asserts use and improvement of land sufficient to qualify to purchase, and whose assertions are contradicted in the field examination, is entitled to notice and an opportunity for a hearing before the application can be rejected and the claim canceled. Richard T. Pope, 22 IBLA 374, 377 (1975); Don E. Jonz, 5 IBLA 204, 207 (1972); Kenai Power Corp., 2 IBLA 56, 59 (1971). However, such opportunity for hearing is unnecessary when the material of record in the locator's favor, taken as true, is insufficient to establish compliance with the law. Stephen P. Sorenson, 22 IBLA 258, 260 (1975); Martha J. Jillson, 6 IBLA 150, 152 (1972). We thus examine whether appellant's assertions on appeal are sufficient, in their conflict with the field examiner's conclusions, to require a remand under these rules.

[2] In Omar Stratman, *supra*, cited by the State Office, this Board held that agricultural uses of land do not fall within the meaning of the phrase "trade, manufacture, or other productive industry," as used in the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970). In that case, the rejection of appellant's application to purchase a site containing portions of a cattle feedlot operation was affirmed.

In Monte L. Lyons, 74 I.D. 11 (1967), the Department rejected as agricultural a trade and manufacturing site containing a greenhouse-nursery operation. Similarly, in Charles G. Forck, A-29108 (October 8, 1962), the Department rejected a trade and manufacturing site purchase application for land planted with grass, grain and legumes, in connection with a commercial seed cleaning operation, on the same basis. " * * * Congress has made a clear distinction between the agricultural use of land and the use of land for trade, manufacturing, and other industrial, business and commercial purposes." Monte L. Lyons, *supra* at 14.

These cases hold that it is the nature of the use of the land itself, not the purpose of the use or the business to which it relates, that governs whether use qualifies as a "trade, manufacture, or other productive industry" within the meaning of the Act. Appellant argues that this site is used and needed

as pasture in connection with the conduct of her and her husband's guiding and hunt trip business, itself admittedly a trade. It is use of the land as pasture, however, not the trade to which the use is connected, that is determinative. 1/ We hold use of land as pasture to be "agricultural use" outside the scope of the trade and manufacturing site provisions. See Omar Stratman, supra; Charles G. Forck, supra.

Appellant's challenge to the field examiner's findings, including the examiner's conclusion that the pasture had been seeded, thus does not create any issue of fact. See Stephen P. Sorenson, supra; Martha J. Jillson, supra. Taken as true, appellant's assertions about the pasture and its use do not establish any use and improvement which qualifies under the trade and manufacturing site provisions. In her statement of reasons appellant admits the land sought is needed for grazing her horses. Her guide business is conducted on other land not here involved. Accordingly, we agree with the decision below that the purpose for which this parcel is sought is agricultural and that the application was properly denied.

Nor do we feel that appellant's challenge to the field examiner's conclusion that the advertising signs are within the Glenn Highway easement creates any issue of fact. Even if they are located outside the highway easement, advertising signs are insufficient use and improvement of land to qualify under the Act. See Mary C. Polen, 24 IBLA 100, 103 (1976).

[3] Finally, an access road is not improvement and use sufficient, by itself, to qualify a trade and manufacturing site. Appellant's right to use the road may be protected and her right of access to Tolsona Lake secured, 2/ but appellant has no right

1/ Thus, in Omar Stratman, supra at 222, 228, appellant was not entitled to purchase the land used as pasture in connection with his feedlot business, but was entitled to purchase the land containing his capital improvements as a headquarters site. We note that the same standards apply to headquarters sites that apply to trade and manufacturing sites, since both types of claim, contained in the same section of the Code, 43 U.S.C. § 687a (1970), require a showing of use of the land in the applicant's "trade, manufacture, or other productive industry."

2/ Congress has provided separate authority for the acquisition of rights-of-way and access to claims and private inholdings. See, e.g., Act of July 26, 1866, 43 U.S.C. § 932 (1970); Solicitor's Opinion, 66 I.D. 361, 363 (1959); 43 CFR Part 2920. An access route is generally not patented to a locator except as an integral physical part of the improved site. Cf. Lavina Jo King, 17 IBLA 309, 311 (1974). Protection of appellant's use is not an issue in this case.

to title to the land so used under the trade and manufacturing site provisions. Road and access use alone cannot establish a right to purchase.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman

Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING SPECIALLY:

As indicated in my separate opinion in Omar Stratman, 16 IBLA 222, 227 (1974), I do not regard a commercial feedlot as an agricultural enterprise, but rather as an industrial activity which would qualify under the law and regulations relating to trade and manufacturing sites. However, in that same opinion I concurred with the panel majority that, as to the portion of the claim that was used as pasture or for the production of feed or forage (as distinguished from the feedlot), the appellant was definitely precluded from obtaining title as a trade and manufacturing site.

Therefore, I concur in the finding and holding of the main opinion that appellant Bunch's use of the land as an improved pasture for horses and ponies is non-qualifying.

Edward W. Stuebing

Administrative Judge

